FILE COPY

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 475

JAMES B. BEAM DISTILLING COMPANY

Petitioner

v.

GABEY BRANDT, d/b/a UNIVERSITY CITY HOUSE OF LIQUORS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EARL B. DICKERSON
BERNARD J. NEWMAN
77 W. Washington Street
Chicago 2, Illinois
Attorneys for Petitioner

R. WALLACE MILLER
ROBERT S. VANCE
4144 Lindell Boulevard
St. Louis 8, Missouri
Of Counsel

INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and rules involved	2
Statement	3
Reasons for granting the writ	7
I. The decision below conflicts directly with decisions of other courts of appeal and conflicts in principle with decisions of this court	7
II. The jurisdictional question is of substantial importance with respect to the allowance of piecemeal review in the federal courts	13
Conclusion	15
Appendices—	
A. Decision of the Court of Appeals denying the motion to dismiss the second appeal and reversing the District Court	17
B. Judgment of the Court of Appeals on the second appeal	33
C. Motion to dismiss plaintiffs' second appeal	36
D. Decision of the Court of Appeals dismissing plaintiffs' first appeal	39
E. Statute and rules	47

CITATIONS.

Cases.

Brandt v. Renfield Importers, Ltd., 216 F. 2d 206 (8th Cir. 1954) 3

Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24 (1890) 7

Doggett v. Hunt, 199 F. 2d 152 (1952) 8, 9

Evans v. Phillips, 17 U. S. 73 (1819) 7

Francisco v. Chicago & A. R. Co., 149 Fed. 354 (8th Cir. 1906) 9, 10

Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F. 2d 105 (2d Cir. 1953), cert. denied, 345 U. S. 964 12

Kelly v. Great Atlantic & Pacific Tea Co., 86 F. 2d 296 (4th Cir. 1936) 8, 9, 11, 12

Schwartz v. Eaton, 264 F. 2d 195 (2d Cir. 1959) 14

United States v. Babbitt, 104 U. S. 767 (1882) 7

United States v. Evans, 9 U. S. 280 (1809) 7

STATUTE AND RULES.

Section 1292 of the Judicial Code (28 U. S. C. 1292) 11, 14, 15

Federal Rules of Civil Procedure:

Rule 41(a)(1) 12, 14

Rule 54(b) 11, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

JAMES B. BEAM DISTILLING COMPANY,
Petitioner,

vs.

HARRY BRANDT, D B A UNIVERSITY CITY HOUSE OF LIQUORS, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. I, pp. 46-50) is not officially reported. The opinion of the Court of Appeals granting petitioner's motion to dismiss respondents' first appeal is reported at 269 F. 2d 14 (App., *infra*, p. 39). The opinion of the Court of Appeals denying petitioner's motion to dismiss respondents' second appeal and reversing the District Court's judgment (App., *infra*, p. 17) is reported at 278 F. 2d 904.

JURISDICTION.

The judgment of the Court of Appeals (App., *infra*, p. 33) was entered on April 27, 1960. On May 27, 1960, petitioner filed a petition for rehearing in the Court of Appeals. Rehearing was denied on July 25, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Prior to trial, three of fourteen defendants in this case were dismissed by the District Court for lack of proper venue. Plaintiffs (respondents) thereupon dismissed the action as to the other defendants "without prejudice" by means of a voluntary nonsuit.

1. The first question presented is whether such a nonsuit permits review of the otherwise non-appealable venue ruling.

2. If the court below had jurisdiction to entertain the appeal, a second question is presented: whether a foreign corporation "transacts business" within a judicial district, under Section 12 of the Clayton Act, if the corporation has no office in the district and does not solicit or make sales in the district, but instead makes sales outside the state to two independent distributors who resell the goods in the district.*

STATUTE AND RULES INVOLVED.

Section 1292 of the Judicial Code (28 U. S. C. 1292) and Rules 41(a)(1) and 54(b) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra*, p. 47.

---

*To avoid undue duplication in the certiorari petitions, petitioner Beam adopts the argument of petitioners Renfield and Wile with respect to the venue issue, but desires to present further argument on that issue if the Renfield and Wile petitions are granted.

STATEMENT.

The complaint in this case charges 14 defendants (including petitioner James B. Beam Distilling Co., hereinafter referred to as "Beam") with having conspired together to violate the antitrust laws in connection with the retail distribution of liquor in the St. Louis area (R. I, pp. 1-7). Treble damages and injunctive relief are sought.

The 1958 Venue Rulings.

On November 20, 1958, the District Court dismissed Beam and two other defendants (Renfield and Wile) on the ground of improper venue. The court held "that the contacts which movants have with this District are not sufficient to constitute the transaction of business within the District as required by Section 12 of the Clayton Act" (*id.*, 50).*

---

* As Judge Harper pointed out, Beam has no office in the District and does not solicit or make sales in the District (*id.*, 48). Instead, Beam delivers its products (all produced outside the District), f.o.b. its manufacturing plants, to two independent wholesale distributors in the District. Judge Harper also pointed out that "the amount of business done in this district by each of the movants is small in comparison to its total sales" (*ibid*).

In addition, Judge Harper referred (*id.*, 49-50) to the prior ruling of Judge George H. Moore in Case No. 8975, still pending in the District Court. The complaint in No. 8975 was filed on January 10, 1953, and is based substantially upon the same allegations as the present complaint. Beam and Renfield and others were also named as defendants in that action (R. II, p. 2). All of the plaintiffs here are included as parties plaintiff in No. 8975 (compare R. I, p. 1 and R. II, p. 2), and plaintiffs' attorneys in No. 8975 are the same attorneys who represent respondents here. In June 1953, both Beam and Renfield were dismissed from No. 8975 by Judge Moore on the ground of improper venue (R. II, p. 14). Referring to Judge Moore's 1953 decision, Judge Harper noted that, "Since that motion was sustained in 1953 the activities of James B. Beam Distilling Company have remained substantially the same in this district" (R. I, p. 50).

No appeal was taken from the 1953 decision dismissing Beam from No. 8975. An appeal, however, was taken from the order dismissing Renfield; that appeal was dismissed for lack of jurisdiction. *Brandt* v. *Renfield Importers, Ltd.*, 216 F. 2d 206 (8th Cir. 1954).

Each of the three orders dismissing Beam, Renfield and Wile (*id.*, 51-53) provided in pertinent part:

> "It Is Hereby Ordered that the above mentioned motion of [the defendant] to dismiss and to quash service of summons, be and the same is hereby sustained and the cause is dismissed as to the said defendant, * * * for improper venue.
>
> "The Court further directs the entry of a final judgment on the claim as to said defendant, which is only one of several claims, and enters this order upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54(b) of the Rules of Civil Procedure."

The Plaintiffs' Prior Appeal.

Relying on the last-quoted paragraph and Rule 54(b), which authorizes appellate review of certain interlocutory orders, the plaintiffs took an appeal to the court below, seeking review of the interlocutory venue rulings of November 20, 1958.

On July 15, 1959, the court below dismissed the appeal (R. III, pp. 3-4). In its opinion, the court held that the gist of the complaint was a charge of conspiracy among the fourteen defendants; that such a charge constitutes only a "single claim for relief" within the meaning of Rule 54(b); and that therefore Rule 54(b) was ineffective to render the decision final and appealable, notwithstanding the terms of the District Court's orders of November 20, 1958. Therefore, since the orders were clearly interlocutory and non-appealable apart from Rule 54(b), the court held that it was without jurisdiction and remanded the case to the District Court. 269 F. 2d 14 (App., *infra*, p. 39).

Proceedings on Remand.

Three weeks later, on August 6, 1959, plaintiffs filed a "memorandum" voluntarily dismissing the action, "without prejudice," as to all other defendants (*id.*, 4-5).* This was done without any notice to the nonsuited defendants and without any hearing or stipulation.

On the same date, August 6, 1959, the District Court entered an order amending the November 20, 1958, orders (*supra*, p. 4) in conformance with the Court of Appeals decision holding Rule 54(b) inapplicable. The August 6, 1959, order (R. III, pp. 5-6) states in pertinent part:

> "Wherefore, after due consideration of the same, it is now here Ordered that the aforesaid separate Orders of this Court filed herein as aforesaid November 20th, 1958, be, and the same are hereby, amended by striking the last paragraph of each of said Orders containing the provision and direction for the entry of final judgments as to the aforesaid defendants in accordance with Rule 54(b) of the Federal Rules of Civil Procedure; the aforesaid orders and each of them in all other respects to remain in full force and effect as heretofore entered."

---

* The memorandum states:

> "By leave of Court first had and obtained, come now plaintiffs and dismiss the above cause without prejudice at plaintiffs' cost as to defendants Heublein, Inc., a Corporation, Paramount Liquor Co., Inc., a Corporation, Gordon Distributing Company, a Corporation, Conrad, Inc., a Corporation, Allstate Distributing, Inc., a Corporation, Manhattan Distributing Co., a Corporation, Pioneer Liquor Company, Inc., a Corporation, Peoples Liquor, Inc., a Corporation, Katz Drug Company, a Corporation."

Plaintiffs' Present Appeal.

Plaintiffs thereupon took a second appeal to the Court of Appeals, again seeking review of the November 20, 1958, venue rulings. Defendant Beam moved to dismiss the appeal on the ground that no appealable order had been entered and that therefore the Court of Appeals was without jurisdiction (App., *infra*, p. 36). After argument, the Court of Appeals denied the motion to dismiss the appeal (App., *infra*, pp. 19-20) and, on the merits, reversed the District Court's holding that Beam, Renfield and Wile were not transacting business in the Eastern District of Missouri (App., *infra*, pp. 20-32).

The petitions of the three appellees for rehearing of the case, on both the appealability and venue issues, were denied.

REASONS FOR GRANTING THE WRIT.

The simple facts of this case place in clear focus the important question of law presented. When confronted with inability to obtain review of an interlocutory decision dismissing three of fourteen defendants for improper venue, plaintiffs entered a voluntary nonsuit dismissing, without prejudice, all other defendants in the case and then again sought review of the same venue ruling. The court below held that the ruling had become appealable and denied the motion to dismiss the appeal.

Review of this decision is necessary (I) because the decision conflicts directly with decisions of other courts of appeal and conflicts in principle with decisions of this Court, and (II) because of the importance of the question with respect to the allowance of piecemeal review in the federal courts.

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH DECISIONS OF OTHER COURTS OF APPEAL AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.

Beginning as early as 1819, this Court has consistently held that no appeal can be taken from a judgment entered on a voluntary nonsuit. See, *e.g.*, *Evans* v. *Phillips*, 17 U. S. 73 (1819); *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24; 39 (1890). Cf. *United States* v. *Evans*, 9 U. S. 280 (1809); *United States* v. *Babbitt*, 104 U. S. 767 (1882).

The rationale of these decisions is applicable here. The court below (App., *infra*, p. 18) explicitly acknowledged that the plaintiffs entered a voluntary nonsuit without

prejudice as to all the other defendants in the case. And it is incontrovertible that it was this voluntary nonsuit which effectively terminated the action; apart from the voluntary nonsuit, the case would have been in precisely the same interlocutory posture as it was on the prior appeal.*

Nevertheless, the court below sustained the use of the voluntary nonsuit device to obtain review of an otherwise non-appealable order. In this respect, the decision below is in direct conflict with the decision of the Fourth Circuit in *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (1936), and the decision of the Fifth Circuit in *Doggett* v. *Hunt*, 199 F. 2d 152 (1952).

In the *Kelly* case, which had been commenced in a state court and then removed to the federal district court, plaintiff moved in the federal district court to remand the action to the state court. When the motion was overruled, the plaintiff himself moved to dismiss the action, and the nonsuit was allowed. Plaintiff appealed from the dismissal and assigned as error the order refusing to remand. The Fourth Circuit, in an opinion by Chief Judge Parker, held that "although a voluntary nonsuit is a final termination of the action," such a nonsuit cannot be used by a plaintiff as a device to obtain appellate review of an otherwise non-appealable order (86 F. 2d at 297).

---

* Apart from the voluntary nonsuit, all that the August 6, 1959, amendment order did was to strike certain surplusage from the November 20, 1958, venue orders, which the court below had held to be interlocutory on the prior appeal (269 F. 2d 14). Under the decision of the court below on that appeal, the November 20, 1958, orders were not appealable so long as the case remained pending in the District Court as to the other defendants in the case. It is the voluntary nonsuit, therefore, which plaintiffs must rely upon to establish their right of appeal; for, apart from the voluntary nonsuit, plaintiffs indisputably had no greater right of appeal on August 6, 1959, than they had on November 20, 1958.

The Fourth Circuit stated (*ibid.*):

> "It does not help plaintiff to say that his complaint is of the order refusing remand of the cause and not of the judgment of nonsuit, which is relied upon merely as a final order from which appeal may be taken. • • • If plaintiff, after refusing to proceed, had not taken a voluntary nonsuit, defendant could have insisted on a verdict and judgment on the merits, which would have been determinative of the rights of the parties and would not have left plaintiff at liberty to commence another action for the same cause, as is his right under the voluntary nonsuit. *The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing.*" (Emphasis added.)

In *Doggett* v. *Hunt*, the Fifth Circuit adopted the holding of the Fourth Circuit *Kelly* decision.

The decision below also cannot be reconciled with the 1906 decision of the Eighth Circuit in *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354. In *Francisco*, Judge Sanborn forcefully explained why a plaintiff should not be permitted to use a voluntary nonsuit as a device to obtain appellate review (pp. 359-360):

> "Courts are established and maintained to settle and terminate controversies between citizens and to enforce their rights, not to furnish debating societies for the trial of legal experiments. • • • A practice which permits a plaintiff to experiment with the courts and to harass the defendant interminably at will runs counter to the basic purpose of legal tribunals and of all civilized governments, and, instead of assisting to wisely administer justice, it inflicts and perpetuates wrong. Yet this is the practice which a grave review of such nonsuits as that in hand would establish. • • • The federal courts ought not to permit themselves to

be made the subjects of such experiments. The only material interests involved in the review of such judgments are the costs of the actions, for the plaintiffs may try their causes again whatever the decisions of the appellate courts, and the demands upon these courts for the decision of real and important issues are too grave and pressing to permit them to devote their time to litigation so frivolous.

"There is a more compelling reason why proceedings of this nature should not be sustained. The plaintiff is not the only party to a lawsuit who has rights. The defendant has some, and one of them is the right, not only to a fair and impartial trial of the action against him, but to a final adjudication of the alleged cause which the plaintiff presents and to a termination of the litigation upon it. This right he can never enforce, this termination he can never secure under the practice here proposed, for there is no limit to the number of actions on the same cause, or on the want of it, which the plaintiff may bring, review, and dismiss under it."

This case well illustrates the problem. Plaintiffs desired piecemeal review of the District Court's interlocutory orders of November 20, 1958, dismissing Beam, Renfield, and Wile; at the same time, they did not wish to abandon their claims against the remaining defendants.* In an effort to achieve the best of both possible worlds, and after rejection of their attempt to do this via Rule 54(b), plaintiffs hit upon the tactic of dismissing the other defendants "without prejudice" and then prosecuting an appeal as to Beam, Renfield, and Wile. If they win in the appellate

* Plaintiffs' basic charge is that the fourteen defendants are guilty of price discrimination in connection with the plaintiffs' purchases of liquor products. All of those purchases, however, were necessarily made from Missouri distributors (since Missouri law forbids out-of-state distillers to sell to retailers). Despite this fact, plaintiffs have nonsuited all the distributor defendants, and thus have dismissed from this action the only defendants who actually made the sales on which their complaint is based. They have also dismissed the retailer defendants, who are charged with having received the alleged discriminations.

courts, since the nonsuit is "without prejudice," they can return to the District Court and start a new lawsuit against all 14 defendants or else seek to have the non-suited defendants restored as defendants in this case; and even if they lose the appeal, they can similarly return to the same District Court and sue the same defendants in another lawsuit based on the same cause of action.

In short, such a nonsuit terminates a preliminary battle but in no sense concludes the war. One particular lawsuit is perhaps ended, but the same litigation lingers on.

For the plaintiffs, the result of such procedural sleight-of-hand is "heads we win, tails you lose." For the other parties and for the courts, however, the only result is a multiplicity of lawsuits and appeals and the imposition of a heavy burden without any compensating advantage, such as materially advancing the ultimate termination of the litigation. Cf. Rule 54(b); 28 U. S. C. 1292 (b).

A. Plaintiffs' Attempt to Distinguish the Kelly and Doggett Decisions Is Wholly Without Merit.

Trying to distinguish the instant case from *Kelly* and *Doggett*, the plaintiffs have with great emphasis argued that their notice of appeal was not directed at the nonsuit but was instead directed at the venue rulings as to Beam, Renfield, and Wile. In fact, however, a precisely parallel contention was made and rejected in the *Kelly* case.

As already noted, Chief Judge Parker in *Kelly* stated (86 F. 2d at 297) that "It does not help plaintiff to say that his complaint is of the order refusing remand of the cause and not of the judgment of nonsuit * * *," and "The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing."

Here, by the same token, each of the venue rulings "is not a final or appealable order, and plaintiff[s] cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing."

B. The Venue Rulings Did Not Become Appealable Merely Because the Present Lawsuit Was Terminated.

As noted, the Fourth Circuit in *Kelly* carefully distinguished between the *finality* of an order and the *appealability* of an order. Chief Judge Parker held that there was no appealable order in that case, "although a voluntary nonsuit is a final termination of the action" (86 F. 2d at 297). This distinction is a basic one; as *Kelly* and *Doggett* illustrate, an order may be "final" but nevertheless not appealable.

The court below, however, ignored this distinction and erroneously equated finality and appealability. The court did not explicitly seek to differentiate this case from *Kelly* and *Doggett*, but there is a suggestion in the court's opinion that appellate review was permissible in this case simply because the lawsuit had been terminated and therefore the District Court had made its "final decision and judgment" (App., *infra*, p. 19). However, any such suggestion not only fails to differentiate this case from *Kelly* and *Doggett* but rather serves to highlight the direct conflict among the circuits.

Of course, the lawsuit was terminated on August 6, 1956 since it was on that date that the plaintiffs entered the voluntary nonsuit. It would have been idle to contend that the action had not been terminated, and such a contention has never been made. It is, after all, the very essence of a voluntary nonsuit that it terminates the action.*

* Rule 41(a)(1), F. R. Civ. P.; see, *e. g.*, *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F. 2d 105, 108 (2d Cir. 1953), cert. denied, 345 U. S. 964 (1953).

But even though the requirement of finality may be satisfied, the question still remains whether the order is appealable. Stated otherwise, the question is whether the plaintiffs can use a voluntary nonsuit "without prejudice" to obtain appellate review of an otherwise non-appealable interlocutory order. On that question, there is a direct conflict among the circuits, and this conflict should be resolved by this Court.

II. THE JURISDICTIONAL QUESTION IS OF SUBSTANTIAL IMPORTANCE WITH RESPECT TO THE ALLOWANCE OF PIECEMEAL REVIEW IN THE FEDERAL COURTS.

The decision below permits piecemeal review of otherwise non-appealable orders solely by virtue of a nonsuit taken by plaintiffs voluntarily, on their own initiative, and without prejudice. If such a device is sustained, then it would follow that any plaintiff could just as easily—and just as painlessly—obtain piecemeal review of comparable interlocutory rulings, simply by going through the same ritual performed by the plaintiffs in this case. The effect is to make the finality requirement illusory in a wide variety of instances.

To begin with, there are numerous cases which present the identical factual situation involved here—*i.e.*, the dismissal (on jurisdictional or venue grounds) of less than all the defendants in a multi-defendant case. As the court below held on the prior appeal (269 F. 2d 14), such orders are interlocutory and not appealable, even where the District Court grants a certificate under Rule 54(b). But that rule, under the decision below, can now be readily circumvented by use of the voluntary nonsuit device.

Nor is there any apparent reason why the device cannot be similarly used to obtain review of many other types of interlocutory orders. Consider, for example, the common

case where a plaintiff's complaint alleges two or more theories of recovery. Under generally accepted law, if one of these theories is stricken by the trial court on a motion to dismiss, the court's ruling is non-appealable.* But, under the decision below, review can now be obtained in that situation merely by entry of a voluntary nonsuit "without prejudice."

Or consider the situations involved in the *Francisco*, *Kelly* and *Doggett* cases, discussed *supra*, pp. 8-10. In *Francisco*, a nonsuit was entered by the plaintiff after the trial judge announced his intention to direct a verdict. In *Kelly* and *Doggett*, a nonsuit was entered by the plaintiff in each case after the trial judge had refused to remand a removed case to the state court. In all three cases, the attempted appeals were dismissed; but, under the decision below, presumably appeals should now be allowed in such situations.

Furthermore, it must be emphasized that under Rule 41 (a)(1) plaintiffs have the absolute right to enter a voluntary nonsuit without prejudice at any time prior to answer. The effect of the decision below, therefore, is to place in the hands of plaintiffs—without any judicial control—sole discretion as to whether numerous interlocutory rulings shall be made appealable. The Congressional trend in this area is in precisely the opposite direction. For example, the Interlocutory Appeals Act of 1958 (28 U. S. C. 1292 (b)) permits review of the orders covered by the Act only after the appellant has obtained the permission of both the District Court and the Court of Appeals.

There are today three basic exceptions to the prohibition against piecemeal review in the federal courts: (a) the original Section 1292 of the Judicial Code (28 U. S. C.

* See, *e.g.*, *Schwartz* v. *Eaton*, 264 F. 2d 195 (2d Cir. 1959).

1292(a)); (b) Rule 54(b) of the Federal Rules of Civil Procedure; and (c) the Interlocutory Appeals Act of 1958. The venue rulings sought to be reviewed in this case do not fall within any of these three exceptions. Undeterred by this omission, the court below has, in substance, created a fourth exception—a fourth exception, moreover, which is not subject to the same safeguards as the other three.

The sweeping implications of the procedure followed in this case, we submit, militate against its adoption by means of judicial decision. Congress, as just noted, is not unaware of the delicate problem of striking a proper balance between requiring final disposition of a controversy and allowing piecemeal review. If it should be deemed desirable for any reason to permit piecemeal review in the circumstances of this case, and thus to expand substantially the jurisdiction of the courts of appeals, that proposal should more properly be directed to Congress. Particularly is this so in view of the previously unbroken line of authorities to the effect that such orders are not appealable.

CONCLUSION.

For the foregoing reasons—the conflict between circuits and the importance of the question—it is respectfully submitted that this petition for a writ of certiorari should be granted.

EARL E. POLLOCK,
BERNARD J. NUSSBAUM,
Attorneys for Petitioner.

R. WALSTON CHUBB,
ROBERT S. ALLEN,
Of Counsel.

October, 1960.

APPENDIX A.

UNITED STATES COURT OF APPEALS.

for the Eighth Circuit.

No. 16,359

Harry Brandt, d b a University City House of Liquors, et al., Appellants, v. Renfield Importers, Ltd., a Corporation, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

[April 27, 1960.]

Before GARDNER, WOODROUGH and BLACKMUN, *Circuit Judges*.

WOODROUGH, *Circuit Judge*.

This action was brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity, against fourteen distillers, distributors, wholesalers, and retailers of liquor for injunction and treble damages for alleged violations of the Sherman Act, the Clayton Act, and the Robinson-Patman Act.

The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize

and have monopolized the trade and commerce in said liquor and the retail distribution thereof in St. Louis, Missouri, and vicinity.

The case was heretofore before this Court on an appeal by the plaintiffs from three orders entered by the District Court on November 20, 1958, which severally dismissed the case as to three defendant corporations, Renfield Importers, Ltd. (referred to as Renfield), James B. Beam Distilling Company (referred to as Beam), and Julius Wile Sons and Company (referred to as Wile), for improper venue and lack of jurisdiction over the person.

The plaintiffs contended on that appeal that the three defendants were "transacting business" in the Missouri judicial district where the suit was brought so that the venue was proper and as they were properly served at their principal places of business, the jurisdiction of the persons was complete. The three orders then appealed from each contained a provision and direction for the entry of a final judgment of dismissal of one of the three defendants in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. This Court was of the view that the action as disclosed by the complaint did not involve multiple claims within the purview of the Rule but rather a single claim of conspiracy joined in by all defendants and that the orders dismissing the three defendants were not final orders and therefore not appealable. It accordingly dismissed the appeal without consideration of the merits of appellants' contentions and remanded the case for further proceedings. 269 F.2d 14.

After the mandate of this court was entered in the District Court and on August 6, 1959, the plaintiffs entered voluntary nonsuit as to all the defendants in the case excepting Renfield, Beam, and Wile, and with approval of the Court, dismissals without prejudice were entered as to

all defendants except the three. On the same day the Court in finally disposing of the action as to the remaining three defendants entered an order in which it referred to the mandate of this Court and to the three orders of dismissal which it had entered on November 20, 1958 in favor of the three defendants and after ordering that those former orders be amended so that the provision and direction based on Rule 54(b) which it had included in those orders be stricken from them, ordered "the aforesaid orders and each of them in all other respects to remain in full force and effect as heretofore entered."

The plaintiffs have taken this appeal from that order of August 6 to obtain reversal of the dismissals of the case as to the three defendants and they contend that the Court erred in sustaining said defendants' respective motions to quash service of process and to dismiss the three defendants for improper venue and lack of jurisdiction of the person. They insist that each of the three defendants is transacting business in the Eastern Judicial District of Missouri within the meaning of 15 U. S. C. A. § 22 (§ 12 of the Clayton Act) and that venue is proper as to each and service at their respective places of business outside of Missouri where they were "found" was sufficient.

The appellee Beam has filed a motion to dismiss this appeal on the ground that the order appealed from is not a final order but we do not find the motion to be meritorious. Although the order of the District Court of August 6, 1959 does not repeat the express words of dismissal that were contained in its previous three orders of November 20, the reference the Court made to those orders and the declaration that the orders and each of them (as amended) were "to remain in full force and effect as heretofore entered" left no ambiguity or uncertainty about the Court's final decision and judgment that the three de-

fendants were not transacting business in the Missouri judicial district and that the case against them was dismissed for that reason. The entry of the order of August 6th afforded the plaintiffs their first opportunity to take a valid appeal from the ruling and order of the District Court dismissing the three defendants and they promptly filed Notice of Appeal. The Notice describes the orders referred to therein which are continued in effect thereby and clearly identifies the proceedings and judgment which the appellants claim to be erroneous. It establishes this Court's jurisdiction to review the dismissals.

The only question of merit in this appeal is whether the District Court erred in holding that the Renfield, Beam and Wile corporations were not "transacting business" in the Missouri judicial district within the intendment of § 12 of the Clayton Act, 15 U. S. C. A. § 22. That section provides:

> Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The District Court in its opinion (unreported) briefly related the facts relative to the issue as they had been proved without dispute by affidavits of the officers and employees of the three defendants and counsel for appellants have not departed from but have somewhat amplified the Court's statement of facts in accord with the evidence and without dispute.

All three of the appellees are "foreign corporations" as to Missouri, the principal offices of Renfield and Wile being in New York, N. Y. and that of Beam being in Chicago, Ill. Each of them was served with process at its

principal office. Each of them had an outstate liquor license for and issued to it by the Supervisor of Liquor Control of Missouri pursuant to § 311.060(6). The cost of the licenses is $250.00 annually. § 311.180(5).

As to the Beam Company. Its selling operations are centered at its main office in Chicago and it has no branch office of any kind in Missouri. It has selected and sells and ships its products to only two licensed distributors in the Missouri district, namely Conrad, Inc., and Manhattan Distributing Co., both of St. Louis, in neither of which does it have any financial interest. It receives its orders for Beam liquors from those distributors at its Chicago office and rejects them or accepts them and makes all deliveries against those accepted by delivering to carriers at its distillery or rectifying plant at Clarmont, Kentucky, f.o.b. that plant, thereby passing title to the goods in Kentucky. It has no stock of merchandise in warehouses or otherwise in Missouri, and no real or personal property there. It maintains a checking account in a St. Louis bank and has there pledged collateral for a loan. Deposits and checks to and from the account are sent from Chicago, where all advertising also is planned and prepared. Beam employs a detail man on a straight salary who resides in the district but has no office or company automobile or Beam stationery with his name on it, but visits retailer-customers of the distributors not on any regular schedule and without any incentive compensation based on sales. He carries no order blanks, has no authority to make sales, or to make adjustments, collections, or credits, and his sole function is promotional in nature, namely, to stimulate interest in Beam's products and to persuade retailers handling Beam's products to give them proper shelf space and display. He has no stock of samples or inventory. He is occasionally requested to make notations of retailer's requisitions for Beam products and

relays such requests to Beam's two distributors. Beam's vice president, Mr. Gertz, supervises the sale of Beam's products to distributors in thirteen states—calling on the distributors at irregular intervals—averaging once every other month on those in Missouri—not for the purpose of taking orders but if given an order by a distributor he transmits it to Beam's office at Chicago for acceptance and processing. Beam is not qualified under the general corporation statute to do business in Missouri as a foreign corporation and has not designated an agent for service of process there. No officer, agent, employee, or director of Beam maintains an office in the district and no officer or director resides therein and no stockholders' or directors' meeting has ever been held there. In 1957 Beam sold $446,000.00 worth of its products to its distributors in the Missouri district of suit, which was 0.7% of all Beam's sales in that year.

As to Renfield. In 1956 Renfield Importers, Ltd., sold $1,580,818.60 worth of goods to its distributors in the district of suit. In 1957, it sold $1,313,947.98 worth of its products in this district, all of which was to the two wholesalers in the district, namely, Conrad Inc., and Paramount Liquor Company, Inc., who were Renfield's distributors.

During 1956, two percent of its total volume was done in St. Louis and St. Louis County. In 1957, 1.72 percent of its case total sales were shipped into the City and County of St. Louis.

Jack S. Birnbaum, vice president of Renfield, in his affidavit filed on behalf of said defendant, states that Renfield is incorporated under the laws of New York. It has never been qualified to do business in Missouri. It is engaged in the business of distributing various kinds of alcoholic beverages throughout the United States. The

sale of its products is conducted through its general office in New York City and regional offices in Chicago, San Francisco, Atlanta, and Los Angeles. Renfield sells its products to wholesalers, state liquor control commissions, and to airlines, railroads, and other common carriers. It has no office, warehouse, plant, distillery, or any kind of business operation or any place for any kind of business operation within the State of Missouri. It does not maintain any inventory or stock of goods in this district, owns no property of any kind in Missouri; has no bank account, no transfer agent, registrar or registered agent for service of process in Missouri, has not designated anyone to act for it in Missouri. It is not listed in any telephone directory in Missouri, its name does not appear upon the door of any office or directory of any building in Missouri. It maintains no salesman, agent, or employee of any kind in Missouri. It sells its products exclusively to two wholesalers doing business in the district, to-wit, Conrad, Inc., and Paramount Liquor Company, Inc. Renfield has no financial interest in and exercises no control over the operations of any of said wholesalers. Title to products shipped to the wholesalers passes before delivery to Missouri.

Renfield's products are sold to its distributors in Missouri pursuant to customers' orders forwarded by the wholesalers to Renfield's Chicago office which in turn transmits them to the New York office where they are received and accepted, or forwarded by the wholesaler directly to the New York office.

Renfield's products sold pursuant to such orders are sold and shipped exclusively f.o.b. its warehouse, or foreign port of the distillery where the products are made or distilled, all of which are located outside of Missouri.

Renfield employs a Division Manager who operates out

of its regional office in Chicago and is engaged in good-will promotional activities in Minnesota, Indiana, North Dakota, South Dakota, Nebraska, Kansas, and formerly in Missouri, but neither such Division Manager nor any other employee has come into the Eastern District of Missouri or conducted any business activities there for about five years prior to the commencement of this action.

It has a Missouri Outstate Liquor Solicitor's License issued by the State of Missouri, which authorizes it to sell its products only to wholesalers, and not to retailers within the State of Missouri.

The executive offices are located in New York, N. Y., and stockholders' and directors' meetings are held there. The corporate books and records are kept there. The company maintains warehouse stocks of its products in New York City, Chicago, San Francisco, and Los Angeles.

As to Wile. Julius Wile Sons & Co., Inc., did $142,000.00 in sales in this district in 1957. The principal office of the Julius Wile Company is in New York; its other place of business is a plant in New Jersey. It sells to only two dealers in Missouri. All of the Julius Wile liquors which go to retailers in the Eastern District of Missouri are distributed by Pioneer Liquor Company, Inc. There are two ways these distillers sell to their wholesalers. In one the distiller pays the tax and sells at the price plus the federal tax. The other is to sell in bond, just pay for the products, and then when they get the product out of bond, they pay the government tax directly.

The sales are made f.o.b. New York and New Jersey. The Julius Wile Co. employs Richard D. Ruane, who resides in St. Louis County, to promote good will, and consumer and customer acceptance of Julius Wile's products in Missouri, Kentucky, Kansas, and part of Illinois.

Pioneer distributes Wile's products in the Eastern District of Missouri and Central States distributes Wile's products in the Western District of Missouri. All sales of Wile's products to retailers and others in the State of Missouri are made either by Pioneer or by Central States. All orders by Pioneer or by Central States for Wile's products intended for re-sale in Missouri are forwarded to Julius Wile's offices at New York, either directly or through Ruane, by mail, telephone, or telegraph; the products so ordered are shipped to the respective places of business of Pioneer or Central States in the State of Missouri, as the case may be, f.o.b. New York, New Jersey, or foreign port. Pioneer and Central States are billed for all such products by, and make payment directly to, Julius Wile in New York by mail.

Ruane's duties in the district of suit are to maintain contact with Pioneer and Central States, to suggest methods of promoting good will toward, and consumer and customer acceptance of Wile's products. He does not carry order blanks. He has no authority to make or modify any contract with any wholesaler, distributor, retailer, person, firm, or corporation in the Eastern District of Missouri; he does not approve credits, nor make collections from Pioneer or Central States nor any customer of Pioneer or Central States.

In 1957, approximately 1½% of Wile's products were sold by Pioneer in the Eastern District of Missouri. Wile maintains no stock of goods or inventory in Missouri, does not own or rent any property in Missouri. Ruane is the only employee of Wile in Missouri. He does not maintain an office or place of business in connection with his employment by Wile: Wile is not listed in any telephone book, nor on any door or building directory; Ruane is not listed; his salary and expense account are paid by check issued in New York and mailed to him in Missouri;

he is required to make periodic visits throughout his territory in Missouri, Kentucky, Kansas, and part of Illinois. He does not spend more than fifty percent of his working time in connection with his duties in the Eastern District of Missouri.

Richard L. Blum, Jr., as President and Director, made an affidavit on behalf of Julius Wile Sons & Co., Inc., stating Wile is incorporated under the laws of New York, has never qualified to do business in Missouri; that Wile is duly licensed under § 311.180(6) of the Revised Statutes of Missouri, 1949, as an out-of-state corporation to offer intoxicating liquors for sale only to or through duly licensed wholesalers in the State of Missouri. The company makes no retail sales in this district. The company has no interest in either Pioneer or Central States.

The sales Wile made to distributors in the district in 1957 amounted to $142,000.00.

All of the enumerated details of transacting business that the appellees do not engage in in Missouri are stressed by them to support their contention that they do not transact any substantial business in the district. The record clearly indicates, however, that in supplying their liquor to the district of suit they do not offend in any respect the requirements of the Missouri Liquor Control Law, R. S. Mo. 1949 Ch. 311. The appellants do not claim that the appellees have "agents" in Missouri directly carrying on the sale of appellees' products but their claim is that when appellees' business of selecting certain distributors in the district of suit and of selling their brands of liquor and causing them to be transported into the district to those distributors for distribution there "is judged in its totality" it must be concluded that they each do transact some substantial business in the district of suit. *Exhibitor's Service* v. *Abbey Rents*, 135 F. Supp. 112. They contend that each of the appellees is transacting business

in the district in such a sense as to establish the venue of the suit there although not present by agents carrying on business in such character and in such manner that each appellee is found therein, or is there amenable to local process—because each in fact in the ordinary and usual business or commercial sense transacts business there of substantial character. *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359. Appellants refer to the declaration of the Supreme Court concerning venue in antitrust cases in *United States* v. *Scophony Corporation*, 333 U. S. 795, that "the practical, every day business or commercial concept of doing or carrying on business of any substantial character became the test of venue" and insist that the business of appellees fully meets that test. As particulars in which the business of appellees meets the test, the appellants point to (1) appellees' taking out licenses in the state and acting under them by selecting and dealing with certain wholesalers in the district as their exclusive vendees and distributors there and planning and providing advertising for solicitation of sales by and through them; (2) by maintaining their close, continuous, day-to-day business relations with their distributors, they in practical concept are transacting liquor business in the district; (3) the volume of the business of each appellee in the district is substantial.

(1) The Missouri Liquor Control Law prescribes the taking out of a license as a prerequisite to selling or offering for sale liquor in the state (§ 311.050) and the

> issuance of licenses to non-residents of Missouri or to "foreign" corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by, or through a duly licensed wholesaler within this state

of Missouri is expressly sanctioned by § 311.060(1). § 311.180 provides that:

> No corporation shall sell or offer for sale intoxicating liquor within this state or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the supervisor of liquor control authorizing them so to do. For such license there shall be paid to and collected by the director of revenue charges as follows: * * * (6) For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors of all kinds to, by, or through a duly licensed wholesaler within the state the sum of two hundred and fifty dollars.

Penalities are provided for violations by § 311.880.

A main object of Missouri's Liquor Control Law is the regulation of the peculiar traffic in the state and the issuance of licenses to the several classes of liquor dealers that take part in it is an important means to that end. The taking out of liquor licenses by appellees identifies them with the traffic in the state and subjects them pro tanto to the state's regulation. The requirement that they report all the sales they are making to and through their distributors in the district establishes direct and continuing transactions with the state officers as an integral part of their business operation. It certainly was not any matter of mere form or ceremony. On the contrary, it constitutes a transacting of business of far reaching importance related to all sales of their brands of liquor made for distribution in the district.

(2) Of course, it is not to be considered in isolation. As a closely related matter, appellees have each selected two licensed Missouri wholesale liquor dealers to distribute all of the liquor of their brands that is shipped into the district. The liquor control law prohibits the foreign corporations from setting up places of business and selling within the state. But it is not the object of the law to exclude appellees' brands, only to stringently regulate the traffic. When the foreign corporation makes its selection

of only one or two wholesaler dealers to be identified with its brands and to handle all its products in the district, perhaps for long periods of time, that also is a serious business transaction. The record does not include the contracts between appellees and their distributors, but it is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price. Beam sends its vice president and Wile sends an employee into the district to maintain personal good will contacts with the distributors, but Renfield has such relations with its distributors to which its sales amounted to $1,580,818.10 in 1956 and $1,313,947.98 in 1957 that it does not need to and does not send any employee into the district to call upon them.

Appellees stress that their distributors are independent contractors and such they may appear to be in the technical common law sense. But they are not independent like a casual customer would be who occasionally makes a purchase from a vendor. On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish.

Although appellees have not presented the contracts covering their relations with their distributors, it is not to be assumed that exclusive distributorships which include the opportunity to sell in the important market of St. Louis and vicinity such great amounts of standard, nationally advertised goods as those here involved are entered into without some obligation express or implied. Appellees show that their distributors perform their functions in order to earn a margin of profit between costs and sales instead of wages, but there is no indication that ap-

pellees are not free to select other distributors in place of the present ones if they are so minded. We think that in every day business conception the district of suit served with appellees' products as it is, would be sharply contrasted with a district where appellees' products were not for sale or obtainable and where appellees transacted no business. The relations of the appellees with their distributors is too close and continuous for all the transacting of the business to be attributed in common understanding to the distributors and none to the appellees.

Again, advertising according to plan is a most important factor in the nationwide sales of the many millions of dollars worth of their products annually by appellees. They plan and supply the advertising in the district of the suit pursuant to the express provisions of their license from the state. It constitutes a costly and serious transacting of business and affects the sales so directly that it cannot be disregarded in judging whether in the totality of their operations the appellees transact business in the district.

(3) The large amounts of the sales made in 1957, $1,313,947.98 by Renfield, $446,000.00 by Beam, and $142,000.00 by Wile demonstrate that the business transacted was very substantial. That the sales constituted a very small fraction of the business carried on in all the districts throughout the country by each of the three appellees (1.72% as to Renfield, 0.7% as to Beam, and 1.5% as to Wile) is immaterial. *Green* v. *U. S. Chewing Gum Mfg. Co.*, 224 F. 2d 369, *Sunbury Wire Rope Mfg. Co.* v. *U. S. Steel Corporation*, D. C. E. D. Pa., 129 F. Supp. 425. But the amounts sold reflect the systematic, continuous carrying on of the business and the continuity of conduct and relationship between the suppliers of the goods and the distributors of them indicates cooperation and participation of both in transacting business in the area.

The appellees describe their nationwide sales as made

to wholesalers and distributors in the different states and press the doctrine of independent contractor to the point that it might be concluded that they do not transact business in any state except at their home offices. But we think that position is contrary to the teaching of *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453, *Green* v. *U. S. Chewing Gum Mfg. Co.*, 224 F. 2d 369, *Sunbury Wire Rope Mfg. Co.* v. *U. S. Steel Corporation*, 129 F. Supp. 425, *United States* v. *Scophony Corporation*, 333 U. S. 795, *Exhibitors Service Inc.* v. *Abbey Rents et al.*, 135 F. Supp. 112, *Naifeh* v. *Ronson Art Metal Works*, 111 F. Supp. 491, *Jeffrey-Nichols Motor Co.* v. *Hupp Motor Corp.*, 46 F. 2d 623, *Abrahams* v. *Bendix Home Appliances*, 96 F. Supp. 3, *Austad* v. *United States Steel Corporation*, 141 F. Supp. 437, *Vance* v. *Miners Memorial Hospital Association*, 161 F. Supp. 178.

No point has been made concerning the service of process that was had upon the appellees if they were in fact transacting substantial business in the district of suit. The service was in the districts where they were inhabitants and were found. § 12 of the Clayton Act, 15 U. S. C. A. § 22.

The appellees have cited the following as illustrative cases in which a corporation's activities in a district were found not to constitute "transacting business": *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 70 F. Supp. 77; *Lechler Laboratories* v. *Duart Mfg. Co.*, 35 F. Supp. 839; *Schiller* v. *Mit-Clip Co., Inc.*, 180 F. 2d 654; *Midwest Fur Producers Assn.* v. *Mutation Mink Breeders Assn.*, 102 F. Supp. 649; *Seaboard Terminals Corp.* v. *Standard Oil Co. of N. J.*, 104 F. 2d 659; *Reid* v. *University of Minnesota*, 107 F. Supp. 439; *Austad* v. *United States Steel Corp.*, 141 F. Supp. 437; *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645;

Windsor Theatre Co. v. *Loew's Incorporated*, 79 F. Supp. 871; *Commonwealth Amusement Enterprises, Inc.* v. *Colonial Theatres Co., Inc.*, 79 F. Supp. 763.

None of these cited cases appear to give substantial support to the position of appellees. In the case of *Austin* v. *United States Steel Corporation*, *supra*, the Court commented:

> Some aid may be derived from a consideration of the purpose which motivated Congress in providing the test of transacting business. In the *Scophony* case, the Supreme Court commented as follows on the effect of 15 U. S. C. A. § 22: "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then, by retreating or even without retreating to its headquarters defeat or delay the retribution due." 333 U. S. at page 808.

In this case, the working arrangements between the licensed appellees and the licensed distributors they have selected to handle their liquor in St. Louis and vicinity is such that if so disposed they would have as good opportunity to "perpetrate the injuries outlawed" as if they had agents working for them in the area. The case therefore presents the situation the Supreme Court referred to in the *Scophony* case where the venue for suit against such foreign corporations is in the district where it is charged they have violated the Act.

The judgments of dismissal appealed from are reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16359. September Term, 1959.

Wednesday, April 27, 1960.

Harry Brandt, d/b/a University City House of Liquors, Frank G. Viviano, d/b/a Viviano Importing Company, Sam Zucker, d/b/a Case House of Liquors, Louis Fangmeyer, d/b/a Spencer's House of Liquors, Nathan Malnik, d/b/a Malnik Candy & Tobacco Shop, Louis Marcus, d/b/a Lou's News & Tobacco Shop, Caesar Venegoni, d/b/a Caesar's Package Liquors, Maurice Sabbath, d/b/a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d/b/a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d/b/a Broughton's House of Liquors, Albert W. Roudman, d/b/a The Seventeen-O-One Package Store, Nathan Meyer, d/b/a Hi-Pointe Liquors, Ben Martin, d/b/a Ben Martin Liquor Store, William Sabbath, d/b/a Sabbath Package Liquors, Elmer Saul, d/b/a Saul's Liquors, Alfred Chotin, d/b/a Crown House of Liquors, Paul Koines, d/b/a T and T House of Liquors,

Appellants,

vs.

Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Missouri and the Motion of appellee James B. Beam Distilling Company to dismiss the appeal, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Motion of appellee James B. Beam Distilling Company to dismiss the appeal be, and the same is hereby, denied.

It is further Ordered and Adjudged by this Court that the judgments of dismissal of the said District Court appealed from be, and the same are hereby reversed with costs; and that Harry Brandt, d/b/a University City House of Liquors, Frank G. Viviano, d/b/a Viviano Importing Company, Sam Zucker, d/b/a Case House of Liquors, Louis Fangmeyer, d/b/a Spencer's House of Liquors, Nathan Malnik, d/b/a Malnik Candy & Tobacco Shop, Louis Marcus, d/b/a Lou's News & Tobacco Shop, Caesar Venegoni, d/b/a Caesar's Package Liquors, Maurice Sabbath, d/b/a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d/b/a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d/b/a Broughton's House of Liquors, Albert W. Roudman, d/b/a The Seventeen-O-One Package Store, Nathan Meyer, d/b/a Hi-Pointe Liquors, Ben Martin, d/b/a Ben Martin Liquor Store, William Sabbath, d/b/a Sabbath Package Liquors, Elmer Saul, d/b/a Saul's Liquors, Alfred Chotin, d/b/a Crown House of Liquors, Paul Koines, d/b/a T and T House of Liquors, have and recover against Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation, the sum of Four Hundred Seventy-four and 36/100 ($474.36) Dollars for their costs in this behalf expended and have execution therefor.

And it is further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court this day filed herein.

April 27, 1960.

APPENDIX C.

UNITED STATES COURT OF APPEALS.

For the Eighth Circuit.

Harry Brandt, d/b/a University City House of Liquors, et al., *Appellants*, *vs.* Renfield Importers, Ltd., a Corporation, et al., *Appellees.*	Civil No. 16359.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS APPEAL.

To the Judges of the United States Court of Appeals for the Eighth Circuit:

James B. Beam Distilling Co., one of the appellees herein, moves to dismiss the appeal in said cause and as the basis for and the grounds of the motion states:

1. On November 20, 1958, the District Court (Judge Roy W. Harper) ordered the dismissal of the three appellees from the action on the ground of improper venue. R. I., pp. 51-53.* In its order dismissing these defendants

* "R. I." refers to the record filed by the appellants on their previous appeal to this Court (No. 16,157). "R. II" refers to the supplemental record filed by this appellee on the previous appeal. "R. III" refers to the record filed by the appellants in connection with this appeal.

the District Court directed entry of final judgment as to them pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

2. Plaintiffs appealed from the orders dismissing the above named defendants. That appeal was dismissed by this Court. *Brandt* v. *Benfield Importers, Ltd.*, 269 F. 2d 14 (1959). The Court held that the gist of the complaint was a conspiracy among all of the fourteen defendants; that such a charge constitutes only a "single claim for relief" within the meaning of Rule 54(b); and that therefore Rule 54(b) was ineffective to render the venue rulings final and appealable. The case was ordered remanded to the District Court (R. III, p. 4).

3. On August 6, 1959, plaintiffs, by means of a memorandum signed by their attorneys and endorsed by Judge Harper, voluntarily purported to "dismiss the above cause without prejudice" as to the remaining defendants (R. III, p. 4).

4. On the same date, August 6, 1959, the District Court entered an order which amended the November 20, 1958, orders by striking therefrom the provision for the entry of "final judgments as to the aforesaid defendants [Beam, Benfield, and Wile] in accordance with Rule 54(b) of the Federal Rules of Civil Procedure," but otherwise continuing the November 20 orders in full force and effect (R. III, p. 6). Plaintiffs now appeal from this order (id. pp. 6-7).

5. The August 6, 1959, order was amendatory only and merely struck from the November 20, 1958 orders, language which had been declared to be surplusage by this Court in the *Brandt* case. This is not an appealable order. Plaintiffs' purported voluntary dismissal of the action as to some of the defendants "without prejudice" does not convert the August 6, 1959 order into an appealable order and does not render the interlocutory venue rulings appealable.

WHEREFORE, appellee James B. Beam Distilling Co. moves this Court to enter an order dismissing the appeal of plaintiffs taken herein from the order of the District Court entered on August 6, 1959.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
R. WALSTON CHUBB,
ROBERT S. ALLEN,
611 Olive St., St. Louis 1, Missouri,
Attorneys for Appellee, James B. Beam Distilling Company.

EARL E. POLLOCK,
JULIUS LEWIS,
BERNARD J. NUSSBAUM,
SONNENSCHEIN, LAUTMANN, LEVINSON,
RIESER, CARLIN & NATH,
77 W. Washington St., Chicago 2, Ill.
Of Counsel.

STATE OF MISSOURI, }
CITY OF ST. LOUIS, } ss.

Copy of the above Motion to Dismiss appeal was served upon counsel for all parties by mailing copies of same, on the 25th day of February, 1960.

/s/ Robert S. Allen.

Subscribed and sworn to before me this 25th day of February, 1960.

/s/ Lorraine Callahan.
Notary Public.

(Notarial Seal)

My commission expires June 21, 1960.

APPENDIX D.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit.

No. 16,157

Harry Brandt, d b a University City House of Liquors et al., *Appellants*,

vs.

Renfield Importers, Ltd., a Corporation et al., *Appellees*.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 15, 1959.]

Before GARDNER, *Chief Judge*, and JOHNSEN and VOGEL, *Circuit Judges*.

GARDNER, *Chief Judge*.

This was an action brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity against fourteen distillers, distributors, wholesalers or retailers for certain alleged violations of the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act. The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize and have monopolized the trade and commerce in said liquors

and the retail distribution thereof in St. Louis, Missouri and vicinity. The complaint also contained allegations as to damages claimed by the individual plaintiffs, for which they prayed judgment, including treble damages in the amount of $1,329,300.00 and costs, including reasonable attorney's fees, and for an injunction restraining the defendants and enjoining them from continuing said alleged violations of the anti-trust laws.

Three of the defendants, to-wit: Renfield Importers Ltd., James B. Beam Distilling Co., and Julius Wile Sons & Co., Inc., each filed a motion to quash the service of process and to dismiss on the grounds of improper venue and lack of jurisdiction over the person. In resisting these motions plaintiffs contended that the court acquired jurisdiction because these three defendants (now appellees) were "transacting business" in the State of Missouri. The court heard these motions and on the proof addaced sustained them and entered orders of dismissal as to the three defendants. Each of these orders of dismissal contains recital that:

> "The Court further directs the entry of a final judgment on the claim as to said defendant, which is only one of several claims, and enters this order upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure."

From the orders so entered plaintiffs have appealed, seeking reversal on substantially the following grounds. The court erred in holding that the three appellees were not "transacting business" in the Eastern Judicial District of Missouri within the meaning of Sec. 22, Title 15, U. S. C. (Sec. 12 of the Clayton Act) because under the anti-trust laws a corporation is engaged in transacting business for the purpose of venue, although it is not present by agent,

carrying on the business, if in fact in the ordinary and usual sense it transacts business therein of any substantial character.

Simultaneously with the filing of their briefs, each appellee filed a motion to dismiss the appeal, with supporting brief, on substantially the following grounds. The order appealed from is not an appealable order in that, (1) the complaint in this case sets forth a single claim and does not set forth multiple claims, (2) the order appealed from does not dispose of the entire matter and is, therefore, not a final judgment, and (3) the order appealed from is not appealable under Rule 54 (b) of the Federal Rules of Civil Procedure because no more than a single claim for relief was presented in this action. These motions to dismiss the appeal were presented and argued by counsel for the respective parties in connection with the issues raised by appellants by their appeal.

Manifestly, if the motions to dismiss the appeal are well-founded, it should not be necessary to consider the merits of appellants' appeal and for that reason we shall first consider these motions.

The complaint charged the fourteen named defendants with combining and conspiring together in restraint of trade and commerce, which alleged restraint, it is charged, resulted in a monopoly. Plaintiffs demanded money judgment for treble damages in the amount of $1,329,300.00, for an injunction against the defendants, restraining and enjoining them from continuing the alleged violations of the Acts, and for costs and attorney's fees. By this complaint all of the fourteen defendants were charged as joint tort-feasors. There was no claim against any single defendant but they were charged with combining and conspiring together to commit the acts alleged to be violative of the anti-trust laws. The complaint was dismissed as to

the appellees, not on the ground that they had not combined and conspired with the other defendants, but because the court had not acquired jurisdiction over them, and the dismissal of the complaint on that ground confessedly would constitute no bar to an action against them on the same cause of action in a court which might acquire jurisdiction by proper service of process. The dismissal of the action as to appellees left undetermined the issues in the case, either as against them or the other defendants. It is a salutary rule, long adhered to by Federal courts, that, except where otherwise provided by statute, a cause of action must be treated as a unit, not triable piecemeal, nor appealable in fragments. *Arnold v. United States for Use of W. B. Guimarin & Co.*, 263 U. S. 427; *Hohorst v. Packer Co.*, 148 U. S. 262; *Stanley v. Roberts*, 8 Cir., 59 Fed. 839; *Moss v. Kansas City Life Ins. Co.*, 8 Cir., 96 F. 2d 108; *Minnesota Min. & Mfg. Co. v. Technical Tape Corp.*, 7 Cir., 208 F. 2d 159; *Hunter v. Federal Life Ins. Co.*, 8 Cir., 167 F. 2d 192; *Brandt v. Renfield Importers, Ltd.*, 8 Cir., 215 F. 2d 206.

As early as 1894, in *Stanley v. Roberts, supra*, the late Judge Walter H. Sanborn, speaking for this Court, said:

> "An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable."

This rule has been consistently adhered to by this Court. Thus, in *Moss v. Kansas City Life Ins. Co., supra*, it is said:

> "Considering the rules announced in the above cases, it would seem that the application of the above

rule announced in the *Rosenberg*, *Pesaro* and *Goldey* Cases should be limited to cases in which the void service of process attaches to all of the defendants. So construed, the rule is harmonious with the broad general rule that for an order, decree, or judgment to be final for appeal purposes such must completely dispose of the action."

The decisions of this Court are clearly in harmony with the views of the Supreme Court expressed in *Arnold v. United States for Use of W. B. Guimarin & Co., supra*, where it is said:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

It is, however, contended by appellants that the orders dismissing the action as to the appellees for want of jurisdiction are appealable because the trial court, pursuant to Rule 54 (b), Federal Rules of Civil Procedure, directed the entry of a final judgment, "• • • upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure." It is therefore necessary to consider the provisions of Rule 54 (b), Federal Rules of Civil Procedure. This Rule reads as follows:

"Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there

> is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

As has been observed, all of the fourteen defendants named in the action including the appellees were charged with a combination and conspiracy in restraint of trade in violation of the anti-trust laws of the United States. For this alleged violation of the law, plaintiffs sought a single judgment as damages. The rule authorizing appeals is, on its face, limited to one involving multiple claims. There may be said to be multiple parties plaintiff or multiple parties defendant, but there is involved only a single claim for damages alleged to have been suffered by reason of the combined action of the defendants constituting a conspiracy. We are of the view that this action did not involve multiple claims but rather a single claim as disclosed by the complaint. *Sears Roebuck & Co.* v. *Mackey*, 351 U. S. 427; *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445; *Steiner* v. *Twentieth Century-Fox Film Corp.*, 9 Cir., 220 F. 2d 105; *Carr* v. *City of Anchorage*, 9 Cir., 235 F. 2d 780; *Luria Bros. & Co.* v. *Rosenfeld*, 9 Cir., 244 F. 2d 192; *Reagan* v. *Traders & General Insurance Co.*, 5 Cir., 255 F. 2d 845; *Lee* v. *Porcelain Patch & Glaze Corp.*, 5 Cir., 240 F. 2d 763; *Meadows* v. *Greyhound Corp.*, 5 Cir., 235 F. 2d 233; *Nettles* v. *General Accident Fire & Life Assurance Corp.*, 5 Cir., 234 F. 2d 243; *Hardy* v. *Bankers Life & Casualty Co.*, 7 Cir., 222 F. 2d 827; *District 65* v. *McKague*, 3 Cir., 216 F. 2d 153; *Youpe* v. *Moses*, D. C. Cir., 213 F. 2d 613. In *Steiner* v. *Twentieth Century-Fox Film Corp.*, *supra*, plaintiff

sought to recover judgment against seven defendants for alleged violations of the anti-trust laws. The action was dismissed as to six of the defendants and plaintiff sought to appeal as the trial court had certified under Rule 54 (b) that there was no just cause to delay an appeal by plaintiff from the judgments of dismissal. In the course of the opinion as to the appealability of the order of dismissal it is said, inter alia:

> "This judgment is not final. The appeal must therefore be dismissed without a consideration of the merits. Rule 54 (b) applies only to a case in which multiple claims are asserted by or against one or more parties. In the absence of multiple claims no final judgment can be entered under the Rule."

Construing Rule 54 (b), the Supreme Court in *Sears Roebuck & Co.* v. *Mackey, supra*, said in part:

> "The amended rule does not apply in a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal."

The inherent nature of the cause of action cannot be changed by a trial court's certification that multiple claims are involved. The mere signing of the formula prescribed by Rule 54 (b) cannot, we think, have the magical effect of transforming a multiple parties action into a multiple claims action. As said in *Gold Seal Co* v. *Weeks*, D. C. Cir., 209 F. 2d 802:

> "The fact that the motions judge, in the order sought to be reviewed, characterized the same as a final judgment upon a separate claim can not make the order such a judgment or the claim such a claim, if the claim

fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required."

The appeal is therefore dismissed without consideration of the merits of appellants' contentions and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

APPENDIX E.

28 U. S. C. 1292 provides:

§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Court of Appeals may thereupon, in its discretion permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, ch. 646, 62 Stat. 92; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 727; July 7, 1958, Pub. L. 85-508, § 12 (c), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-91, 72 Stat. 1770.)

Rule 41(a)(1) and Rule 54(b), Federal Rules of Civil Procedure, provide:

Rule 41.—Dismissal of Actions.

(a) Voluntary dismissal: Effect thereof.

(1) *By Plaintiff: by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Rule 54.—Judgments; Costs.

* * * * *

(b) Judgment upon multiple claims. When more than one claim for relief is presented in an action, whether

a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.